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IN THE

Supreme Court of the United States

October Term, 1951.

No. 343.

OSCAR W. EHRHORN,

Petitioner,

vs.

INTERNATIONAL MATCH REALIZATION COMPANY, LTD.,

Respondent.

—o—

In the Matter

of

INTERNATIONAL MATCH CORPORATION,

Bankrupt.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

David M. Palley,
Counsel for Petitioner.

Lodge Appeal Press, Inc., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Oscar W. Ehrhorn respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on June 25, 1951 (R. 320). The judgment affirmed, one of the judges in part dissenting (R. 304) a judgment of the

United States District Court for the Southern District of New York (R. 146 et seq.).

The District Court judgment directed the Petitioner, a former Referee in Bankruptcy, to refund the sum of $236,729.38 (with interest the amount is $290,849.76) commissions received by him in the bankruptcy of International Match Corporation. The refund was directed not because the commissions were more than the amount allowed by the Bankruptcy Act, but because a so-called *unwritten* (R. 58) "standing rule" set $20,000.00 as the sum which any Referee in Bankruptcy should receive as commissions in any one year, and the $236,729.38 represents the aggregate of the Petitioner's commissions in excess of $20,000.00 for the sixteen years from 1932 to 1947 inclusive (R. 292 et seq.).

Opinions Below.

The opinion of the Court of Appeals is not yet reported but appears at page 292 of the record. The opinion of the District Court is not reported and appears at page 143 of the record.

Jurisdiction.

The judgment of the Court of Appeals was entered in the Office of the Clerk of the Court of Appeals on June 25, 1951.

Jurisdiction to issue the writ is found in Section 24c of the Bankruptcy Act. 11 U. S. C. 47c and Section 1254 (1) of the Judicial Code and Judiciary, 11 U. S. C. 1254 (1).

Questions Presented.

1. Was there a standing rule in the Southern District of New York limiting or restricting the right of Referees

in Bankruptcy to receive the full commissions allowed by the Bankruptcy Act?

2. If there was such a standing rule, is the estate of International Match Corporation entitled to the funds which the Petitioner is directed to refund?

3. May courts of bankruptcy establish unwritten standing rules which do not comply with General Order 56?

4. May a court of bankruptcy exercise jurisdiction to adjudicate adverse claims allegedly owned by a closed estate and exercise jurisdiction over adverse claimants allegedly indebted to such estate, before the closed estate is reopened?

5. Did the Court of Appeals rightly decide that the District Court had jurisdiction to adjudicate summarily the claim against this Petitioner, over Petitioner's objection?

6. May the Petitioner be directed to refund commissions earned prior to the amendment of the Bankruptcy Act in 1938?

7. Is the Petitioner liable for the refund of the commissions collected by him from the estate of International Match Corporation Bankrupt as Referee in Bankruptcy?

Statutes and General Orders Involved.

The pertinent statutes and general orders are set forth in the Appendix to this petition (pp. 20-23).

Statement.

International Match Corporation (hereinafter referred to as International) was adjudicated a bankrupt on April

19, 1932 and the matter was referred generally to Petitioner; on June 1, 1932, Irving Trust Company was appointed Trustee; and on June 25, 1947 the estate was closed (R. 93). International Match Realization Company, Ltd. (hereinafter referred to as Realization) a Bermuda corporation, had been organized to represent debenture creditors (R. 5; 294) and the debentures had been cremated before the estate was closed (R. 167).

On December 29, 1948, Realization procured an order which directed the Petitioner and Irving Trust Company to show cause why (R. 3-4):

1. the estate should not be reopened; and Irving Trust Company continued as Trustee;

2. all orders authorizing payment of commissions to the Petitioner should not be set aside;

3. and judgment should not be entered directing the Petitioner to repay to Irving Trust Company—as Trustee all commissions received by him in the bankruptcy proceeding (R. 3).

In its petition (R. 4-17) for the order to show cause, Realization averred, as the ground for such relief, that the Petitioner herein received and accepted commissions in excess of the $20,000.00 yearly average set by the so-called "standing rule".

This Petitioner, in his answer (R. 18-41), denied the material allegations of the petition and challenged both the existence and the validity of this so-called "standing rule". He also denied the Court's "jurisdiction to determine the issues herein in summary proceedings" (R. 22) and pleaded estoppel (R. 25-26) and laches (R. 25) as defenses.

Irving Trust Company appeared specially (R. 166) and moved the dismissal of the proceeding against it, on the ground that the estate having been closed it could not be reinstated as Trustee (R. 89).

The proceeding against Irving Trust Company was, on its motion, eventually dismissed (R. 147).

The matter was referred to a Special Master "to take testimony and report upon all questions of law and fact involved therein, with his recommendation" (R. 42; 54).

International was one of the corporations in Ivar Kreuger's industrial empire. Its interests were wide and large; the general claims allowed in the proceeding were over $97,000,000.00; the total assets were over $37,000,000.00 (R. 57).

Between the date of the adjudication in April 1932, and the closing of the estate in June 1947, seven dividends, amounting to $33,919,024.75, were paid to general and preferred creditors. Upon that the Petitioner received the statutory commissions of 1% amounting to $339,190.25 (R. 58).

The first two dividends totaling to $14,722,877.65 were declared on December 20, 1935 and October 20, 1936 respectively (R. 94) and on January 27, 1937 an order (R. 179; 261) was entered which in part provided that "Irving Trust Company, Trustee in bankruptcy herein, earmark and set apart in escrow the statutory commissions of the Referee in Bankruptcy heretofore *earned* subject to the order of the Court or Referee" (R. 262). (Emphasis supplied.) The commissions amounted to, and there was set apart, the sum of $147,028.77. The second and third dividends, declared respectively on July 16, 1937 and August 19, 1937, amounted to $12,146,020.48 (R. 94). On November 19, 1937, an order (R. 179; 263) was entered which in part directed the Trustee in Bankruptcy to "earmark and set apart in escrow the statutory commissions of the Referee in Bankruptcy on the dividends heretofore declared June

4, 1937 and July 30, 1937 and respectively paid July 6, 1937 and August 19, 1937 and heretofore *earned* subject to the order of the Court or Referee" (R. 263) (Emphasis supplied) and the order also directed two payments one of $1,000.00 and another $7,500.00 (R. 263). The commissions amounted to $121,460.20 and of that $8,500.00 was paid and $112,960.20 was earmarked and set apart in escrow as statutory commissions earned (R. 17).

A fifth and sixth dividend aggregating $4,897,592.34 were declared in August 1939 and August 1940 (R. 94). No orders were entered with respect to the Referee's commissions on these dividends. The seventh and last dividend, paid on January 25, 1937 amounted to $2,143,980.25 (R. 94) and prior thereto an order (R. 180; 268) was made dated December 13th, 1946 directing the payment to this Petitioner, as "Referee in Bankruptcy, 1% on final dividend to creditors when declared" (R. 269).

Each dividend was paid upon the report of Irving Trust Company as Trustee (R. 217), and the report submitted for the payment of the last dividend showed that there was set apart for the payment of this Petitioner's statutory commissions, the sum of $317,715.21 (R. 65).

Except for the payments totaling $8,500.00 in 1937, all payments received by the Petitioner were made after the amendment of the Bankruptcy Act in September 1938 and the adoption and promulgation by this Court of General Order 56 (App. p. 23) in February 1939 (R. 101-102).

The commissions of a Referee in Bankruptcy, as the Court well knows, were fixed by statute. Until the amendment of the Bankruptcy Act in September 1938, Referees in addition to other fees were entitled for their services, payable after they are rendered, a commission of 1% on all moneys disbursed to creditors (Sec. 40a, App. p. 20). On that basis until September 1938, there had accrued and had been earned, commissions amounting to $259,988.97 besides the $8,500 which had been paid.

The Bankruptcy Act of September 1938 (Sec. 40a, App. pp. 20-21) left Referees' Commissions at 1%, but provided that: "The Judge may, however by a standing rule or otherwise, fix a lower rate of compensation so that no Referee shall receive excessive compensation during his term in office".

In February 1939, this Court adopted and promulgated General Order 56 (App. p. 23) which authorized Courts of Bankruptcy, by action of a majority of the judges, to make and amend rules and directed that copies of rules and amendments "made by any court of bankruptcy shall, upon their promulgation, be furnished to the Supreme Court of the United States".

It seems rather odd, that at the hearing before the Special Master oral testimony was necessary to prove this "so called rule" (R. 300). But that was the case.

In the Southern District of New York there was *no written* standing rule limiting Referees' commissions to $20,000.00 in any one year (R. 58). And, in fact, there was no rule at all.

Proof of this so-called "standing rule", was offered through Referee Kurtz who was called as a witness. Referee Kurtz's testimony given April 7, 1949, 16 years after the event, was as follows (R. 191):

> "Q. Do you recall a meeting of the referees in bankruptcy of this Court held in or about May, 1933? A. I do.
>
> Q. Were you present at the meeting? A. I was.
>
> • • • • •
>
> Q. Did Judge John C. Knox of this Court address that meeting? A. Yes.
>
> Q. Did Judge Knox say anything in the course of his remarks about Referees' fees? A. He did.

Q. Please state to the best of your recollection what was said by Judge Knox about Referee's fees. A. He said that the Judges had met and that they were fearful that some Referees would make so much money that it might cause a scandal and that the judges had determined that the Referees should have a ceiling over their earnings, and that they should not aggregate more than $20,000 in any calendar year.

Q. Did he direct the Referees to govern themselves accordingly? A. He did."

Judge Knox was a witness before a Sub-Committee of the House Committee on the Judiciary in 1933, shortly after this dinner meeting, and his testimony (Exhibit A,, R. 224; 275) of what he said at that dinner is as follows (R. 275-276):

"The Witness: * * * Now, I will tell you what I have done. I have had this thing up with these Referees and have had dinner with them. Months ago I wrote to the Referees and told them to give me a list of every case pending in their office in which their fees would be in excess of $500, with the distinct understanding that I was going, if I could, to limit the fees, and they have sent me what their earnings are. I now have them on my desk, together with the cases in which they will have fees of $500, and I want, if I can, to limit the compensation of referees to some sum of money that is somewhat in line with judicial salaries as they are paid in this town. It is not an easy thing. You take Referee Kurtz, the other day. He is paying as I recall it, something like $2,000,000 of dividends in the United Cigar case. His fee on that will be $20,000. I have had that matter up as to whether I should allow him *—under the Act he is entitled to that sum of money*

—but I have put it up to the Referees that they cannot get so much money by my acquiescence indefinitely, and I have said, 'If you are going to be reappointed by my vote, you will have in a proper case to waive your fees.' Kurtz asked me, 'What about this?' And I told him that he could have that money on this first dividend to the United Cigar creditors, because of the fact that in the two years that he has been in there, his income has been very small.

"Now, I have got the same situation in the case of Joyce. And, in order to save excessive fees from being paid, I remember at least one case in which I sat as the Referee in order to save the estate $50,000. and not pay it to the Referee. *But the equalization and the deduction from fees in these cases under administration, and which in some instances run over a number of years, is not an easy task, and I am not certain yet what is the best and fairest way to limit their income, let us say, to* $20,000.

"The Chairman: This report also indicates that in some instances where Referees act as Special Master, and where the cases subsequently resulted in adjudication, they made charges and received fees, and the report says that that is illegal; and the Examiner cites certain cases.

"The Witness: He cites certain cases, other Circuits, I think, have held to the contrary. I want to take away from them everything of that kind." (Emphasis supplied.)

The Petitioner repeatedly denied the existence of any such rule (R. 227, 19). He requested the right to call Judge Knox (R. 223; 242-245) and even Judge Goddard (R. 202) before whom this matter was heard, but that request was not granted (R. 245; 203).

The only witness called to prove this so-called rule was Referee Kurtz.

It is that statement by Judge Knox which is called the "standing rule".

Augustus N. Hand, C. J., writing for the majority of the Court of Appeals said (R. 300):

> "However, the validity of the rule prior to 1938 is not now before us. For the purposes of this case we can accept respondent's position that the so-called rule was originally but a statement by Judge Knox to the assembled referees in 1933 that no referee who accepted over $20,000.00 in any one year would receive Judge Knox's vote when such a referee came up for reelection at the end of his two year term. Whatever its effect prior to the 1938 amendment, we hold that there was a valid and binding rule thereafter in the Southern District of New York that referees' commissions should not exceed $20,000. annually."

Frank, C. J. in his dissenting opinion said (R. 309-310):

> "Indeed, I would interpret Judge Knox's statement in 1933 as *originally* intended to apply solely to the non-statutory compensation of referees, for to that extent the limitation was valid previous to the 1938 amendment. Thus in *Ehrhorn* v. *Quillinan,* 170 F. (2d) 890 (C. A. 2), we had before us the question of the non-statutory compensation of this very respondent as a Special Master, in the light of the very so-called 'standing rule' again before us in the instant case. We held that 'rule' valid as to such compensation. But we carefully differentiated that situation from one involving his statutory compensation as a referee. As to the latter we said (p. 891) that compensation is to be computed as pro-

vided in Sec. 40 before its amendment and 'is *not subject to diminution or change by agreement since that would be in contravention of public policy which makes any such undertaking void.*'" (Emphasis supplied.)

There is no testimony that after the amendment of the Bankruptcy Act in 1938 there was a reiteration of this statement by Judge Knox or that any action was taken by the Judges in accordance with General Order 56 (App. p. 23). Nevertheless in the opinion of the Court of Appeals, all judges concurring, Judge Knox's statement "in contravention of public policy" and "void" (*supra*) in 1933 becomes a "standing rule" after September 1938.

The Petitioner objected to the reference of all matters to a Special Master (R. 169; 203). It was his position that under the Bankruptcy Act, the Court was without jurisdiction to pass upon the merits of the alleged claim made against him until the estate was reopened; the matter had been referred to a Referee; and a meeting of creditors had been called and a Trustee appointed, as required in Section 44a of the Bankruptcy Act (R. 170; 174). He contended that if a claim existed it could be prosecuted only by a Trustee in Bankruptcy and not by a creditor; that a creditor may move to reopen a closed estate for cause, but can proceed no further and thereafter all right to proceed devolves upon the Trustee.

Both the District Court (R. 205) and the Special Master (R. 176) overruled the Petitioner's objection.

In February 1950, the Special Master rendered his amended report (R. 56 et seq.) and upon that report, judgment was entered herein against this Petitioner (R. 146-148). The judgment confirmed the Special Master's report in every respect; it overruled all objections of the Petitioner; it dismissed the proceeding against Irving Trust Company; it set aside so much of the order entered December 13, 1946 as directed payment of commissions to the

Petitioner; it reopened the estate of International Match Corporation; it referred the matter to a Referee for the election of a Trustee and for such other proceedings as were necessary; it granted judgment to International Match Corporation, Bankrupt, in the sum of $290,849.76; it authorized the Trustee, when elected, to enforce the judgment and to administer the funds when collected according to law; and directed the Petitioner to pay the judgment to the Clerk of the Court, for the benefit of the Bankrupt estate.

It was the position of the Petitioner that the Court could not exercise summary jurisdiction in this matter. He was no longer an officer of the Court, his term having expired on June 30, 1947 (R. 168). He made it quite clear, both to the District Court and to the Special Master, that if proper procedure was followed he intended at the proper time to contest the matter on the merits (R. 175).

On appeal, the Court of Appeals, one of the judges in part dissenting, affirmed the judgment. The Court held that the District Court could proceed summarily in the matter; that it could refer the entire matter to a Special Master before the estate was reopened; that upon the report of the Special Master, it could not only reopen the proceeding but could direct judgment in the favor of a defunct bankrupt before the meeting of the creditors was held and a Trustee appointed; and that the Trustee when appointed could enforce the judgment (R. 292 et seq.).

It had doubts as to the validity of the standing rule which it considered but a statement by Judge Knox, until the Bankruptcy Act was amended in 1938 but held that upon the enactment of the amendment of 1938, this statement became a standing rule (R. 299-300).

The majority of the Court was of the opinion that the commissions which had been earmarked and set apart as *earned* prior to the enactment of the amendment were not in fact earned until the estate was closed and that the commissions became subject to this standing rule under

the provisions of Section 6b of the Bankruptcy Act (R. 302).

The dissenting Judge took the position (R. 304-319) that the commisisons which were earmarked and set apart prior to the enactment of the amendment had been earned and constitutionally were the property of the Petitioner. It was his position that only the commisisons earned since the enactment of the amendment were liable to refund and that the Petitioner should be directed to refund only those commissions. In his opinion the taking from the Petitioner of the commissions which, had been earned before the amendment constituted a taking of property without due process of law (R. 306).

Specification of Errors.

1. The Court of Appeals erred in affirming the orders and judgment of the District Court appealed from.

2. The Court of Appeals erred in not reversing the judgment of the District Court dated July 24, 1950 in all respects except insofar as it reopened the estate.

3. The Court of Appeals erred in holding that the District Court had jurisdiction to adjudicate the claim against the Petitioner summarily.

4. The Court of Appeals erred in holding that jurisdiction existed to adjudicate the claim against Petitioner before the estate was reopened.

Reasons for the Allowance of a Writ.

Aside from the importance of this question to the Petitioner, who had been a Referee in Bankruptcy from 1924 to 1947, and who is now charged with violation of a "standing rule" of the District Court and who is directed to

repay $236,729.38 with interest, commissions which he collected and upon which he paid in 1947 alone in income taxes $172,246.12 (R. 26), there are involved questions of public importance. The matter concerns the operation of the District Courts in their functioning as Courts of Bankruptcy and involves questions which have not but should be settled by this Court.

I.

This so-called "standing rule" violates General Order 56 (App. p. 23).

In February 1939, after the amendment of the Bankruptcy Act in September 1938 this Court adopted and promulgated General Order 56. That order permitted courts of bankruptcy to make and amend rules and required that "copies of rules and amendments so made by any court of bankruptcy shall, upon their promulgation, be furnished" to this Court.

The Court of Appeals assumed that originally this so-called "standing rule" was nothing but a statement by Judge Knox (R. 300) but declared: "Whatever its effect prior to the 1938 amendment, we hold that there was a valid and binding rule thereafter in the Southern District of New York that referees' commissions should not exceed $20,000 annually."

There is no evidence that this statement made in 1933, was ever repeated by Judge Knox or that the judges had taken any action to have it declared or promulgated as a rule of the Court.

Moreover, this so-called "standing rule" was vague, indefinite and never clearly understood.

In the opinion of the dissenting judge, it was "originally intended to apply solely to the non-statutory compensation of referees" (R. 309).

The amendment to Section 40a of the Bankruptcy Act (App. pp. 20-21) permitted judges by standing rule or

otherwise to fix a lower rate of compensation for referees, but surely it did not exempt a court of bankruptcy from complying with the provisions of General Order 56.

We submit that this Court has never defined the limitations imposed by General Order 56 upon the power of courts of bankruptcy to make rules and that such a definition is necessary.

II.

The District Court was without jurisdiction to undertake and pass upon the merits of the claim against this Petitioner before the estate was reopened.

The Court of Appeals' decision in upholding the exercise of jurisdiction by the District Court is in direct conflict with that court's decisions in previous cases (see *In re Graff*, 250 Fed. 997, 1918; *In re Schwartz*, 4 F. [2d] 895, 1925) and with the decision of the Circuit Court of Appeals, Seventh Circuit in *In re Leigh*, 272 Fed. 678, 1921, cert. den. *sub nom. Chicago Equipment Co.* v. *Laughlin*, 256 U. S. 698.

The courts of bankruptcy can exercise only such jurisdiction as is conferred upon them by statute. Jurisdiction, except for the purpose of reopening a closed estate, ends when the estate is closed and is not resumed until the estate is reopened.

The order of reference in this matter insofar as it referred the merits of the claim against this Petitioner to the Special Master constitutes an exercise of jurisdiction in violation of the Bankruptcy Act and the judgment, except in so far as it reopens the estate is a nullity.

Courts of Bankruptcy may "reopen estates for cause shown" (Sec. 2 [a][8] Bankruptcy Act) and thereafter "The creditors of a bankrupt * * * shall at the first meeting of creditors * * * after an estate has been reopened appoint a trustee or three trustees of such estate" (Sec. 44a, Bankruptcy Act) (App. p. 20).

In the instant matter before the estate was reopened the District Court appointed a Special Master not only to inquire whether the estate should be reopened but to report on the merits of the claim made against this Petitioner.

Section 70 of the Bankruptcy Act vests all title to the bankrupt's estate in the trustee. He becomes vested with all causes of action and he alone may sue or prosecute any claim of the estate (70 [a] [6] App. p. 21). Under Rule 17 (a) of the Rules of Civil Procedure, he is the real party in interest and it is he who must prosecute the claim in behalf of the estate (see *United States* v. *Smelser* [5 C. C. A. 1937] 87 F. [2d] 799; *Stephan* v. *Merchants Collateral Corp.,* 256 N. Y. 418; *In re Leigh,* supra, Sec. 47a, Bankruptcy Act, App. p. 21).

In the instant proceeding Realization claiming to be a creditor not only moved to reopen the estate but also prosecuted the claim.*

Our research has failed to disclose a single decision by this Court in which the procedure to be followed and the jurisdiction which may be exercised by a District Court upon an application to reopen an estate, was set forth.

III.

The matter here involved was a controversy over funds collected by the Petitioner under claim of right and the District Court was without jurisdiction to adjudge it summarily. The decision of the Court of Appeals is in conflict with this Court's decision in *Harrison* v. *Chamberlain,* 271 U. S. 191 (1926).

The controversy concerned the existence and terms, aside from the validity, of the so-called standing rule. The

*It appears from the brief submitted in its behalf in the Court of Appeals that during the pendency of the hearings before the Special Master, to wit: on December 31, 1949, Realization was dissolved by voluntary action of its stockholders.

controversy was not colorable but genuine; even the judges were not in agreement as to its terms and application.

If, as it is charged the fees were illegally collected by this Petitioner then a plenary action should have been brought (see *United States* v. *Smelser* [5 C. C. A. 1937], 87 F. 2d 799).

IV.

The judgment would unjustly enrich the bankrupt estate with upwards of $290,000. The bankrupt estate had not been wronged and it is entitled to no redress. The so-called "standing rule" was not made for its benefit.

After February 13, 1939, commissions when withdrawn from the estate were deposited in the official account in a depository as prescribed by General Order 26 (R. 230). The checks were drawn to the order of the referee in his official capacity and were for no more than the 1% allowed by Statute (R. 205).

Surely the bankrupt estate could not complain at the 1% commission which was deducted because the deduction and the rate were fixed by statute (Sec. 40a, Bankruptcy Act, App. pp. 20-21). Nor could it have sued for the return of the commissions if they had been left in the official account.

The thesis of the judgments of the lower Courts is that by withdrawing those commissions from the official account to his individual use, the bankrupt estate became entitled to the refund of commissions.

In his amended report, the Special Master in a footnote says (R. 73):

> "The District of Connecticut, after the amendment of Sec. 40 (a) by the Chandler Act, solved this problem [surplus funds] under Local Bankruptcy Rule 100 (promulgated January 11, 1940), by turning such surplus into the indemnity fund, and hence into the United States Treasury."

If it was the intention of the so-called rule, that any commissions not paid to referees belonged to the estates administered under their supervision then there should be proof of that fact. Such proof is here absent.

And, if such was the intention then why should the estate of International Match Corporation be favored over other estates referred to the Petitioner. From 1932 through 1947 commissions collected from International amounted to $339,190.25 and from other estates to $257,698.31 (R. 103).

The Special Master said in his report (R. 70):

> "* * * The interposition of the $20,000 ceiling meant that full statutory commissions would be received from some estates and only a part, or none at all, from others."

Certainly, Congress intended that the Bankruptcy Act should be uniformly and impartially applied.

The right to that fund if the Petitioner is liable for its repayment, presents an important question which should be passed upon by this Court. If it belongs to the United States, then this Petitioner could perhaps set off against it the income taxes paid upon such fees to the United States of America.

V.

The judgment is contrary to Section 6a of the Bankruptcy Act (App. p. 21). That Section reads as follows:

> "Nothing herein contained shall have the effect to release or extinguish any penalty, forfeiture, or liability incurred under any Act or Acts of which this Act is amendatory."

It was the position of the majority of the Court of Appeals that the commissions which had been set apart in

escrow for this Petitioner, were not earned because the Statute made them payable after they (services) are rendered. Such a construction of the statute is in direct conflict with General Order 35 (App. p. 22). General Order 35 expressly provided: "He (the judge) may also, pending such proceedings, * * * order the commissions of Referees * * * to be paid immediately after such commissions accrue and are earned." If the Court of Appeals' interpretation of the statute of former Section 40a of the Bankruptcy Act is correct and commissions were not earned until the estate was closed and fully administered, there would have been no need for the order contemplated by General Order 35.

The commissions set apart in escrow were commissions earned and the right to payment became a vested right, and if it were the intent and purpose of the Chandler Act to deprive this Petitioner of that right it would be unconstitutional because it would be taking property without due process of law.

However, the Act expressly exempts from its provisions, liabilities which existed under the prior Act. The commissions which had been earned prior to the adoption of the Chandler Act, were a liability of the estate, as much a liability as any other debt contracted in the administration of the estate.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari to review a judgment of the Court of Appeals for the Second Circuit, should be granted.

Respectfully submitted,

DAVID M. PALLEY,
Counsel for Petitioner.

Dated New York
Sept. 14, 1951.

APPENDIX.

Bankruptcy Act.

Sec. 2. 11 U. S. C. 11. *Creation of Courts of Bankruptcy and Their Jurisdiction*

a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to——

* * * * *

(8) Close estates, by approving the final accounts and discharging the trustees, whenever it appears that the estates have been fully administered * * *; and reopen estates for cause shown; * * *.

Section 40a—Act of February 5, 1903—32 Stat. 797, 799

Sec. 40. *Compensation of Referees.*—a. Referees shall receive as full compensation for their services, payable after they are rendered, * * * from estates which have been administered before them one per centum commission on all monys disbursed to creditors by the trustee, * * *.

Section 40a—Act of June 22, 1938—52 Stat. 840, 859

Sec. 40. *Compensation of Referees.*—a. Referees shall receive as full compensation for their services, payable

after they are rendered, * * * from estates which have been administered before them, 1 per centum commissions on all moneys disbursed to creditors by the trustee, * * *. The judge may, however, by standing rule or otherwise, fix a lower rate of compensation, so that no referee shall receive excessive compensation during his term of office, * * *.

"Sec. 44. 11 U. S. C. 72. *Trustees; Creditors' Committees; and Attorneys.*—a. The creditors of a bankrupt, * * * shall, at the first meeting of creditors * * * after an estate has been reopened, appoint a trustee or three trustees of such estate. * * * "

"Sec. 47. 11 U. S. C. 75. *Duties of Trustees.*—a. Trustees shall (1) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest; * * * "

"Sec. 70. 11 U. S. C. 110. *Title to Property.*—a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or of the original petition proposing an arrangement or plan under this Act, except insofar as it is to property which is held to be exempt, to all * * * (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; * * * "

Section 6a Act of June 22, 1938; 52 Stat. 840, 940

Sec. 6. *Effect of This Amendatory Act.*—a. Nothing herein contained shall have the effect to release or extin-

guish any penalty, forfeiture, or liability incurred under any Act or Acts of which this Act is amendatory.

General Orders in Bankruptcy 11 U. S. C. foll. Sec. 53

No. 26, Accounts of Referee, as amended January 16, 1939 effective February 13, 1939.

"Every referee shall maintain, substantially in the manner indicated by Form No. 46, a cash book or a record in which he shall keep an accurate and itemized account showing (1) his receipts of moneys * * * as compensation for his services, * * *. All moneys received as aforesaid shall be deposited forthwith to the credit of the referee in his official capacity in a depository designated by the court for the purpose, and shall be disbursed only by check signed by the refeee in his official capacity. * * * "

No. 35, Compensation of Clerks, Referees and Trustees as amended December 11, 1905

* * * * *

"(2) The compensation of referees, prescribed by the Act, shall be in full compensation for all services performed by them under the Act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the Act and allowed by special order of the judge."

* * * * *

"(4) In any case in which the fees of the * * * referee, * * * are not required by the Act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the

judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; * * *. He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned."

No. 56, Rules by Courts of Bankruptcy as Added January 16, 1939, effective February 13, 1939.

"Each court of bankruptcy, by action of a majority of the judges thereof, may from time to time make and amend rules governing its practice in proceedings under the Act not inconsistent with the Act or with these general orders. Copies of rules and amendments so made by any court of bankruptcy shall, upon their promulgation, be furnished to the Supreme Court of the United States."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 343

OSCAR W. EHRHORN,

Petitioner,

v.

INTERNATIONAL MATCH REALIZATION COMPANY, LTD.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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Abbreviations Used in this Brief

Court below:	Court of Appeals for the Second Circuit.
District Court:	United States District Court for the Southern District of New York.
Ex.	Exhibit.
R.	The printed record in this Court.

IN THE

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OCTOBER TERM, 1951

No. 343

OSCAR W. EHRHORN,
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v.

INTERNATIONAL MATCH REALIZATION COMPANY, LTD.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent files this brief in opposition to the petition of Oscar W. Ehrhorn for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit which affirmed a judgment reopening the bankrupt estate of International Match Corporation and directing the petitioner to repay excess commissions withdrawn from the estate in violation of a standing rule of the District Court.

Opinions Below

Court of Appeals—*Ehrhorn* v. *International Match Realization Company, Ltd.*, 190 F. 2d 458 (C.A. 2nd 1951); (R. 292).

District Court —The opinion of the District Court is not reported (R. 143). The District Court confirmed the amended report of the Special Master which contains a full statement of the case and the findings and conclusions upon which the judgment of the District Court was based (R. 56-103, 146).

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Section 24c of the Bankruptcy Act (11 U.S.C.A. §47c) and Section 1254(1) of the Judicial Code (28 U.S.C.A. §1254(1)).

POINT I

The petition presents no question of general importance.

The petition presents seven questions which the Court is asked to decide (Petition, pp. 2-3).

Question No. 1 is purely a question of fact as to whether or not the Judges of the District Court adopted the so-called standing rule limiting the compensation of the referees. Petitioner has failed to include in the record filed in this Court all of the evidence which supports

finding No. 4 (R. 93).* No attempt is made in the petition to show that finding No. 4 is contrary to the clear weight of the evidence. This finding, concurred in by the Court below, will be accepted by this Court without re-examination of the evidence in accordance with the two-court rule.

> *Page* v. *Arkansas Gas Corp.*, 286 U. S. 269, 271 (1932);
> *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367 (1942).

Five of the questions revolve about a statute and standing rule of the District Court which are no longer in effect. (Questions 1, 2, 3, 6 and 7, Petition, p. 3.) The statute (Section 40a of the Bankruptcy Act), as in effect during the period May 1933 to July 1, 1947, provided that the referees in bankruptcy were to be compensated by commissions on distributions to creditors. (11 U.S.C.A. §68a; Appendix hereto, p. 8.) The standing rule limited the compensation of referees of the District Court to $20,000 per annum (R. 191). As of July 1, 1947 the Referees' Salary Act of June 28, 1946 amended Section 40a by eliminating the commission basis of compensation and placing the referees on a salary (11 U.S.C.A. §68a; Appendix hereto, p. 8). Thus, these five questions involve

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* Petitioner's Ex. 8, the transcript of proceedings before the District Court in the *Warner Sugar Company* case. The findings made on petitioner's statements in that case were sustained in *Ehrhorn* v. *Quillinan*, 170 F. 2d 890 (C.A. 2nd 1948) (R. 180). Petitioner's Ex. 9, the semi-annual reports made to the District Court showing a consistent reporting of compensation over a number of years at approximately $20,000 per annum (R. 61-62, 103, 181). Petitioner's Ex. 12, the account books of petitioner, which fail to fully disclose his receipt of excess commissions (R. 62-64, 103, 190). These exhibits were all a part of the record in the Court below (R. 281). Although the petitioner has formally denied that there was a standing rule, he has in substance conceded finding No. 4 (Par. 5 of the petition [R. 6] and par. 15 of the answer [R. 24]; R. 196-200).

only matters of historical interest. It is most unlikely that any such questions will arise in the future. They are of no consequence in the present-day functioning of the bankruptcy courts.

The remaining questions, Nos. 4 and 5, relate to the procedure for the reopening of an estate in bankruptcy and to the summary jurisdiction of the court. As we shall attempt to show in Point II of this brief, these questions were decided by the Court below in accordance with established principles. Thus they present no important issues which need to be settled by this Court.

POINT II

No conflict of decisions is presented by the petition.

In Points II and III of the argument in support of the petition, it is asserted that the District Court was without jurisdiction to pass upon the merits of the controversy prior to the reopening of the estate and that the District Court could not adjudicate the matters in controversy in summary proceedings (Petition, pp. 14-16; see Questions 4 and 5, Petition, p. 3). Petitioner relies on *In re Schwartz,* 4 F. 2d 895 (C.A. 2nd 1925), *In re Graff,* 250 Fed. 997 (C.A. 2nd 1918), *In re Leigh,* 272 Fed. 678 (C.A. 7th 1921), cert. den. *sub nom. Chicago Railway Equipment Co.* v. *Laughlin,* 256 U. S. 698 (1921), and *Harrison* v. *Chamberlin,* 271 U. S. 191 (1926).

As indicated by the Court below, petitioner misconceives the nature of these proceedings (R. 294). The power to act in summary proceedings is not only granted by the Bankruptcy Act but is one of the inherent powers of the court (R. 294, 86-88). As an officer of the court exercising judicial functions, the petitioner occupied a position similar to that of a fiduciary, particularly with respect

to matters affecting his personal interest. Indeed, we think the obligations of the petitioner as a referee in bankruptcy were greater than those of the ordinary fiduciary because of the greater power and authority vested in him. He attempted to exercise his powers as referee—powers which he held in trust—for his own personal benefit. He violated his obligations to the court and interfered with the administration of the International Match Corporation estate by the court. The authorities relied on by the Court below indicate clearly that the District Court had power to protect itself, the property in its custody, and the creditors, and in doing so, to proceed summarily (R. 294).

The bankruptcy court had the power to proceed *sua sponte*. It was unnecessary that there be a petitioner (R. 294).

The powers of the court, which are upheld by the decision below, are essential to the preservation of the integrity of the court. These powers were exercised by the District Court with due regard to the petitioner's right to a fair trial. The petitioner availed himself of his opportunity to be heard to the extent that it suited his purposes (R. 174-6, 192, 194-200, 221-226, 234).

It should be noted that in the *Graff* case, *supra*, decided by the Court below, it was held that the facts did not justify a reopening. In the *Schwartz* case, *supra*, there was no attempt to invoke the jurisdiction of the bankruptcy court by a petition to reopen the estate. Since these cases were decided, Section 2a(8) of the Bankruptcy Act has been amended to permit reopening of estates "for cause shown".* The *Leigh* case, *supra*, merely holds that the court need not adjudicate the ultimate issues in granting

* 11 U.S.C.A. §11a(8). Prior to the 1938 amendment to Section 2a(8) it was necessary to show that the estate had been "closed before being fully administered" in order to obtain a reopening.

a petition to reopen. The extent of proof required to justify the reopening of a bankrupt estate is clearly within the discretion of the bankruptcy court. In citing *Harrison* v. *Chamberlin, supra,* the petitioner incorrectly assumes that these are turnover proceedings (R. 295).

POINT III

The standing rule did not violate General Order 56.

It is contended in Point I of the argument in support of the petition that the standing rule violated General Order 56 (Petition, pp. 14-15, 11 U.S.C.A. foll. §53, Appendix hereto, p. 9). This General Order, which became effective on February 13, 1939, is patterned after Rule 83 of the Federal Rules of Civil Procedure. The standing rule was announced in May 1933 (R. 191), long before the promulgation of General Order 56. The Chandler Act amendment to Section 40a of the Bankruptcy Act, which became effective on September 22, 1938, granted specific authority to the bankruptcy courts to limit the compensation of the referees by "standing rule or otherwise" (11 U.S.C.A. §68a). Congress had been advised of the standing rule in the District Court at the hearings before the House Committee on the Judiciary in June 1937. (See Report of Hearings on H. R. 6439 before the House Committee on the Judiciary, 75th Congress, 1st Session, June 1937, pp. 88-90.) It seems clear that one of the purposes of the amendment to Section 40a was the ratification of the standing rule here in question.

Since the standing rule was promulgated prior to the effective date of General Order 56, there was no obligation to furnish a copy of the rule to the Supreme Court of the United States. The last sentence of General Order 56 requires only that copies of rules be supplied "upon

their promulgation". This is the construction given to similar language contained in Rule 83 of the Federal Rules of Civil Procedure. *Zeth* v. *Penna. R. Co.*, 7 F.R.D. 612 (D.C. Penna. 1947).

Moreover, the standing rule was not a rule governing "practice" within the meaning of the General Order. See *Kellman* v. *Stoltz*, 1 F.R.D. 726, 728 (D.C. Iowa, 1941); *State* v. *Frazier*, 36 Oregon 178, 59 Pac. 5 (1899).

The petitioner had knowledge of the standing rule (R. 191). He was not prejudiced by failure to furnish a copy of the rule to the Supreme Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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APPENDIX

Bankruptcy Act

During the period May 1933 to September 22, 1938, the pertinent provisions of Section 40a of the Bankruptcy Act read as follows:

> "Referees shall receive as full compensation for their services, payable after they are rendered, a fee of * * *; and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustees * * *." (11 U.S.C.A. §68a)

The Chandler Act added the following sentence at the end of Section 40a, effective on September 22, 1938:

> "The judge may, however, by standing rule or otherwise, fix a lower rate of compensation, so that no referee shall receive excessive compensation during his term of office, * * *." (11 U.S.C.A. §68a)

The Referees' Salary Act of June 28, 1946 amended Section 40a to read as shown below. This amendment became effective on July 1, 1947.

> "§40a. Referees shall receive as full compensation for their services salaries to be fixed by the conference, in the light of the recommendations of the councils, made after advising with the district judges of their respective circuits, and of the Director, at rates not more than $10,000 per annum for full-time referees, and not more than $5,000 per annum for part-time referees. In fixing the amount of salary to be paid to a referee, consideration shall be given to the average number and the types of, and the average amount of gross assets realized from, cases closed and pending in the territory which the referee is to serve, during the last preceding period of ten years, and to such other factors

as may be material. Disbursement of such salaries shall be made monthly by or pursuant to the order of the Director." (11 U.S.C.A. §68a)

General Order 56

This General Order was added on January 16, 1939 and became effective February 13, 1939.

"56.—Rules by Courts of Bankruptcy.

"Each court of bankruptcy, by action of a majority of the judges thereof, may from time to time make and amend rules governing its practice in proceedings under the Act not inconsistent with the Act or with these general orders. Copies of rules and amendments so made by any court of bankruptcy shall, upon their promulgation, be furnished to the Supreme Court of the United States and the Administrative Office of the United States Courts." (11 U.S.C.A. foll. §53)

The last nine words were added by amendment of June 23, 1947, effective July 1, 1947.